

PROCEDURAL FEATURES OF THE ALBANIAN CASE LAW ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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Abstract

The internationalization of goods and services in the last decades have underscored the importance of international commercial arbitration and its enforcement mechanism of the foreign awards. The recognition and enforcement of foreign arbitral awards under the jurisdiction of a state, is mostly provided through the effect of the New York Convention (1958), which is sanctioned today in 146 countries worldwide. Albania has become part of this large group of states which have voluntarily chosen to share the unquestionable values established by the New York Convention in the field of international commercial arbitration. But despite the formal aspect, Albanian jurisprudence clearly shows an unconsolidated experience of the Albanian judiciary in the field of recognition of foreign arbitral awards. This is not only because of the short time coexistence of the Albanian legal order with the Convention, but also because of a limited knowledge of traders on the instruments established by the Convention and because of the judicial system indifference demonstrated toward the Convention traditional interpretation. This article aims to bring in the spotlight the features manifested by the Albanian jurisprudence, regarding the procedural aspects of the recognition of foreign arbitral awards. These aspects have been found by the research of several judicial decisions of the Court of Appeals, upon the requests for recognition of foreign arbitral awards.

Keywords: Arbitration, law enforcement

Introduction

From an overview of Albanian internal legal framework, we arrive at the conclusion that the implementation situation of New York Convention for the Republic of Albania is, at least formally, in compliance with the

standards that meet its other member countries¹⁵³. Accordingly, Albanian Parliament has approved the accession of the Republic of Albania in this Convention, with the law no.8688 date 09.11.2000 “On the accession of the Republic of Albania in the Convention “On the recognition and enforcement of foreign arbitral awards”¹⁵⁴. A direct consequence of accession is the formal commitment of the Republic of Albania, in the international arena, to respect all the mechanism established by the Convention and specifically:

(a) *Recognition and enforcement of foreign arbitral awards (purpose of the Convention)*¹⁵⁵.

(b) *Recognition of the international arbitration agreement, signed between the parties*¹⁵⁶.

(c) *Failure to settle the national court jurisdiction*¹⁵⁷.

(d) *Failure to apply differing procedures in the effective implementation of the awards*¹⁵⁸.

Despite the above law which has made the Convention part of the Albanian internal legal order, a group of provisions of the Code of Civil Procedure provide directly the recognition and enforcement in the Republic of Albania of the foreign arbitration awards, by unifying this procedure with that of recognition of the foreign judicial decisions¹⁵⁹. This legal framework formally guarantees the enforceability of the awards which are object of the New York Convention. Such a perception, on the effectiveness of formal legal instruments in Albania for the implementation of the New York Convention, results at the responses of the UNCITRAL’s “questionnaire” to monitor the Convention¹⁶⁰, to which Albania is responded as well¹⁶¹.

¹⁵³ Based on the registration made by the United Nations’ section of the treaties in the multilateral list of treaties, the instrument of accession of Albania in the Convention (the law) is registered as delivered on 27 June 2001, while the date of entry into force of the New York Convention for Albania, under the same registration, is 25 September 2001.

¹⁵⁴ Law No.8688 “On the accession of the Republic of Albania in the Convention “On the recognition and enforcement of foreign arbitral awards”, date of act:09.11.2000, date of approval:20.11.2000, Official Journal no.38, page:1836

¹⁵⁵ New York Convention (1958), article 1(1).

¹⁵⁶ New York Convention (1958), article 2(1).

¹⁵⁷ New York Convention (1958), article 2(3).

¹⁵⁸ New York Convention (1958), article 3.

¹⁵⁹ Article 393-399 of the Code of Civil Procedures of the Republic of Albania.

¹⁶⁰ The monitoring of the implementation of the Convention was realized through an international questionnaire consisting of 26 questions in total. The questionnaire is published by UNCITRAL, on 31 August 2010: website - http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html

In this article we will not stop to assess these legal instruments and how effective they are at their foundations, but will highlight the real situation of recognition of foreign arbitral awards in Albania, seen from the viewpoint of the Albanian judicial practice. For this purpose, below are discussed some summarized procedural aspects, found from the research of some decisions of the Civil Panel of the Court of Appeals in Tirana, in connection with request for recognition and enforcement of foreign arbitral awards. Specifically, in this paper are submitted the results of the research and investigation of these case studies:

-Recognition and enforcement in Albania of the International Court of Arbitration's Award (ICC'A¹⁶²) No.13962/FM date 20.10.2006: AEDP *versus* the Republic of Albania¹⁶³.

-Recognition in Albania of the International Court of Arbitration's Award, regarding the issue no.12016/ACS/FM date 02.04.2008: "BE-HA-SE" *versus* General Department of Roads (GDR), the Ministry of Public Affairs, Transportation and Telecommunications (MPATT), Albania¹⁶⁴.

- Recognition in Albania of the Foreign Arbitral Award LCIA no. 5720 date 04.06.2006: "McKinsey & Comany Inc.Croatia *versus* the Union of Chambers of Commerce and Industry of Albania and Albanian Agency for Promoting of Foreign Investments"¹⁶⁵.

-Recognition in Albania of the International Court of Arbitration's Award, no.14420/FM date 25.07.2007: "La Petrolifera Italo-Rumena" Spa. And "La Petrolifera Italo-Albanese" plc. *versus* the Republic of Albania"¹⁶⁶.

-Recognition in Albania of the International Court of Arbitration's Award, date 19.10.2009, issue no.14869/A VH/JEM/GZ: "Company

¹⁶¹ Albanian's answer is given on 16.01.2008: website - <http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/NYCompilation31August2010.xls>

¹⁶² International Court of Arbitration at the International Chamber of Commerce, Paris, France.

¹⁶³ Civil Issue no.22 of the Fundamental Register, date 22.02.2007, to the decision of the Court of Appeal in Tirana no.54, date 29.05.2007.

¹⁶⁴ Civil Issue no.90006-00372-30-2009, registered to the Court of Appeal in Tirana, date 19.02.2009, that belongs the decision file no.23 of the Fundamental Register, date 25.02.2009 and no.34 of the decision, date 31.03.2009.

¹⁶⁵ Civil Issue registered to the Court of Appeal in Tirana no.93/1 of the Fundamental Register, date 30.11.2006; Decision from the Court of Appeal no.17, date 27.02.2007.

¹⁶⁶ Request registered at the Court of Appeal in Tirana with no.1779 protocol, date 28.09.2007; decision from the Court of Appeal no.104 fundamental register, no.106 of the decision, date 08.11.2007.

"ROHDE NIELSEN" A/S *versus* Ministry of Transportation and Telecommunications in the Republic of Albania"¹⁶⁷.

-Recognition in Albania of the International Court of Arbitration's Award, date 22.12.2005, regarding issue no.12112/ACS: "I.C.M.A" s.r.l in liquidation and "AGRI.BEN" s.a.s, *versus* Ministry of Agriculture and Food¹⁶⁸.

In all these cases, one of the parties to dispute is Albania, represented by the government or other public institutions. Given the low number of cases of this nature in Albanian jurisprudence¹⁶⁹, I judge the at the typical procedural aspects of these issues, listed below, actually, all belong to the judicial practice in the field of recognition of international arbitral awards.

Procedural instruments of the case law on recognition and enforcement of foreign arbitral awards

The procedural tool for seeking recognition and enforcement of foreign arbitral award in the Republic of Albania, is **the demand for recognition or recognition lawsuit** (declaratory lawsuit), provided by the articles of the Code of Civil Procedure (CCP)¹⁷⁰. Forced execution of a foreign arbitral award in the Republic of Albania is done in **two phases**. The first phase involves applying for recognition, and at the end of the preceedings, the Court of Appeals dispose for the recognition of the foreign arbitral award in the Republic of Albania. The second phase is related with another judicial proceeding which, also, is conducted by the Court of Appeals, in order that this court can issue the Order of Execution¹⁷¹. It is exactly this order (Order of Execution) which allows intervention of the executive bodies in the Republic of Albania to execute the specific obligation as stipulated in the foreign arbitral award, already recognised in the Republic of Albania¹⁷².

¹⁶⁷ Request registered at the Court of Appeal in Tirana with no.1497 protocol, date 11.10.2010; decision from the Court of Appeal no.108 fundamental register, date 18.10.2010, no.122 of the decision, date 14.12.2010.

¹⁶⁸ Case reviewed by the Court of Appeal in Tirana which has given the decision no.82, date 07.09.2007.

¹⁶⁹ International comperative legal guide regarding "2008 International arbitration", pub. Global Legal Group Ltd. London, with contribution of "Kalo & Associates, Attorneys at Law", page.86, paragraph 14.1.

¹⁷⁰ CCP, article 32, paragraph "c".

¹⁷¹ Legal Base: Code of Civil Procedure (CCP), article 510 and article 511.

¹⁷² See the case: Recognition of the Foreign Arbitral Award LCIA no.5720 date 04.06.2006, case "McKinsey & Comany Inc.Croatia *versus* the Union Chambers of Commerce and Industry of Albania and Albanian Agency of Promotion of Foreign Investment". First phase: Recognition of the award The Court of Appeal in Tirana, based on the provision of article

The Court of Appeal, during the judicial process for recognition of foreign arbitral awards, has examined and analyzed the jurisdiction of the arbitral forum to resolve the conflict. During this analysis, the Court of Appeal affirms the main principle which derives from the *contract theory* of legitimizing the authority of arbitrators, that *the arbitration clause is the only premise for establishing the jurisdiction of the international arbitration*. Thus, in the case “Recognition and enforcement in the Republic of Albania of the Award (ICC): AEDP *versus* Republic of Albania” the Court of Appeal finds that: “...According to the agreement signed between the two parties, they had agreed and had approved an Arbitration Clause too¹⁷³. Specifically in section 2/C, paragraph 8, of the agreement, the parties had agreed that the disputes arising between them regarding this agreement, will be presented for the solution to the International Chamber of Commerce (ICC) Paris. This provision is not disputed by the parties in the process, therefore there is no objection filed by the parties regarding the jurisdiction of the arbitral forum”. **Similary**, in the case of “Recognition of the ICC’s award for the issue no.12016/ACS/FM, date 02.04.2008: “BE-HA-SE” company *versus* General Department of Roads and the Ministry of Public Affairs, Transportation and Telecommunications of Albania”¹⁷⁴, the Court of Appeal

393 of the Albanian Code of Civil Procedure (CCP), has issued the decision no.17 date 28.02.2007 for accepting the request of the applicant (*McKinsey & Comany Inc.Croatia*) and has *recognized and given legal force* to the Foreign Arbitral Award LCIA no.5720. Second phase: The execution of the award McKinsey & Comany Inc.Croatia is addressed for the second time to the Court of Appeal with the request for issuing of the order of execution. The Court of Appeal found that the decision of the Court of Appeal No.17, date 28.02.2007, which has recognized the Arbitration Award LCIA no.5720, in terms of article 510 of the CCP, is an executive title, so the applicant has the standing to seek for the execution order, based on article 511 of the CCP. Therefore the Court, by its decision no.43, date 10.05.2007, has issued an order to dispose the execution of the decision no.17, date 28.02.2007 of the Court of Appeal in Tirana.

¹⁷³ Arbitration Clause – the clause in a bilateral contract which is considered “Written agreement” of arbitration under article 2/2 of the New York Convention.

¹⁷⁴ Parties, General Department of Roads, subordinate structure of the MPATT, and the foreign company "BE-HA-SE", had entered into a contract dated August 11, 1998, with the subject "Rehabilitation and reconstruction of section II of the Corridor East-West route from Rogozhina to Elbasan". Due to the raised conflict between the parties regarding the contract, the plaintiff "BE-HA-SE" in accordance with the arbitration clause dated February 19, 2002 lodged *Request for Arbitration*, at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC).

examines the arbitration agreement stating that the contract between the parties included an Arbitration Clause¹⁷⁵. Likewise, in other cases, the authority that grants recognition (Court of Appeals) confirms the legitimacy of the forum that provided the arbitration award, based on the arbitration agreement between the parties, as part of the main contract between them¹⁷⁶.

The Court of Appeal does not consider the cases on the merits, but only checks whether foreign arbitral award (international), presented for recognition, does not contain one or several circumstances that conflict with article 394 of the Code of Civil Procedure. This is an observation that belongs to all cases heard by the court, which means that this practice rigorously follow the requirements of article 397 of the CCP. Thus, on the case "Recognition of the Award (ICC) No.13962/FM date 20.10.2006: "AEDP vs. Republic of Albania", the Court of Appeal, in accordance with the requirements of article 397 of the CCP, did not review the dispute between the parties on the merits. The Civil Division of this court just checked if the award presented contained or not elements that are considered "legal barriers to recognition", as provided in the article 394 of the CCP. The court, following rigorously the requirements of this section, stated as follows¹⁷⁷:

a) *According to the provisions in force in the Republic of Albania, the dispute is within the competence of the International Foreign Arbitration.* It is evident that there can be no objection to the jurisdiction of the arbitral

¹⁷⁵ In paragraph 67 of the Conditions of the Contract, Part I-General Conditions and part II-the Special Conditions of Implementation, was predicted that in case of disputes between employers (GDR, MPATT) and entrepreneurs ("BE-HA-SE"), regarding this contract, the dispute shall be referred to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris (ICC). Location of the arbitration shall be the Republic of Albania and the arbitration shall be held by the arbitrators appointed under the Rules of Arbitration of the ICC, in English. According to paragraph 5.1/(b) of the Conditions of the Contract, Part II, the parties had agreed that the applicable law was the law in force in the Republic of Albania".

¹⁷⁶ See the Court of Appeal Decision no.106, date 08.11.2007 and Decision no.122, date 14.12.2010, respectively for cases: "Recognition in Albania of the Award, no.14420/FM, date 25.07.2007, "La Petrolifera Italo-Rumena" Spa. and "La Petrolifera Italo-Albanese" plc. *versus* the Republic of Albania" and "Recognition in Albania of the Award, date 19.10.2009, for the case with no.14869/A VH/JEM/GZ "Company "NIELSEN ROHDE" A/S *versus* Ministry of Transportation and Communications of the Republic of Albania".

¹⁷⁷ See the arguable part of the Court of Appeal Decision no.54, date 29.05.2007.

forum because the parties had adopted in their agreement (Framework Agreement) the so-called “Arbitration Clause”.

b) *The request for judgment in arbitration and respective reports are addressed to both parties in the trial and the parties were present during the trial.* In this way, the Court of Appeals has determined that the parties, particularly the defendant (Republic of Albania), were given the opportunity to protect and freely present their cases and the objections to the referral lawsuit in front of the arbitral tribunal.

c) *Between the parties concerned, for the same object and for the same reason, there appears not to have been given a different decision from an Albanian court.* So, we are not in the presence of elements of “res judicata”.

d) *There is no appearance that a lawsuit is being reviewed by an Albanian court before the final award has been rendered by the International Foreign Arbitration.*

e) *The International Foreign Arbitration Award, provided by the International Court of Arbitration at the International Chamber of Commerce (ICC) Paris, France, is a final one and, according to the relevant Regulation¹⁷⁸, appeal is not allowed (article 28 of the Arbitration Regulation).*

Also, in the case “Recognition of the Foreign Arbitral Award LCIA no.5720 date 04.06.2006”, the Court states that: *”the Civil Division of the Court of Appeal, in accordance with the requirements of article 399, in relation to article 397 of the Code of Civil Procedure, does not consider the case on the merits, but only checks whether the presented award (for recognition) does not contain provisions that conflict with article 394 of the CCP”.*

The Court of Appeals has taken measures to provide transparency and fairness for the litigants in processes related to the recognition of foreign arbitral awards. Thus, in all the cases, the calling of the case-losing party (the losing party, which is charged with the obligation of an arbitral award) is officially done¹⁷⁹. Similarly, in all the above cases¹⁸⁰, the Court of Appeal

¹⁷⁸ ICC’A (International Chamber of Commerce, International Court of Arbitration) Regulation of Arbitration valid from January 1, 1998; website - www.iccarbitration.org.

¹⁷⁹ See the decision no.6, date 01.06.2011 of the High Court, paragraph.3, 4, 5: In such circumstances, the plaintiffs, the winner of the case: “I.C.M.A.” s.r.l in liquidation and “AGRI.BEN” s.a.s, as the applicant, are addressed to the Court of Appeal in Tirana with a request for recognition and enforcement of the award, dated 22.12.2005, of the International Court of Arbitration (I.C.C.). The Court of Appeal in Tirana, in the hearing, *ex officio* has called in the trial, as a third party, the case-losing party: Ministry of Agriculture and Food. In this litigation, after having reviewed the case, the Court of Appeal in Tirana

has called at the trial, making relevant announcements, the State Advocacy as representative of the sued party (Republic of Albania) in the process hold in front of the foreign arbitral forum. The Court of Appeal decided the call for participation in this trial of the institution of the State Advocacy, pursuant to the law, as the State Advocacy represent and protects the interest of the Albanian state property in front of national, international and foreign courts regarding judicial matters, in which a state administration body or the Republic of Albania is a party¹⁸¹.

Moments of “bypassing” of the Convention requirements in Albanian judicial practice.

In the adjudication of cases, based on the requests for recognition of foreign arbitral awards, the Court of Appeal generally is being attentive to the formal aspects of the application, or more precisely to the regularity of documentation that must accompany the request of recognition of a foreign award¹⁸².

rendered the decision no.82, date 7.9.2007, which has ruled the rejection of the requesting party”.

¹⁸⁰ See the case “Recognition and enforcement in the Republic of Albania of the Award (ICC) No.13962/FM date 20.10.2006: AEDP *versus* the Republic of Albania”.

¹⁸¹ Law No.10018, date 13.11.2008 “On the state advocacy”, article 5, section 1, paragraph “b”.

¹⁸² (i) Case “Recognition of Award (ICC) No.13962/FM, date 20.10.2006: “AEDP vs. The Republic of Albania”. The Court of Appeal states: *“In addition to the formal application, the applicant has submitted the attached: (a) The award of the International Court of Arbitration, the subject of request for recognition, translated and certified, and (b) the Special Attorney for representation of the applicant by a lawyer. As above are met the requirements of Article 396, paragraph (a) and (c) of the Albanian CCP, as the foreign arbitral award is translated and legalized by a notary”*. (ii) Case “Recognition of the award for “BE-HA-SE” vs. DPRR”, the Court of Appeal accepts the accompanying documents of the request stating: *“The aplicant (GDR) has attached these documents to the demand for Recognition addressed to the Court of Appeal: a) a copy of the Contract signed between the two parties on August 11, 1998 which includes the Arbitration Clause, verified in the appropriate way; b) The traslated letter in Albanian of the above contract; c) Copy of the Final Arbitration Award no.12016/ACS/FM, date April 2, 2008, verified in the appropriate way; d) The text in Albanian language (official translation) of the Final Arbitration Award; e) The letter dated April 7, 2008 from the Secretariat of the International Court of Arbitration for communication the final award and offical translation into Albanian language; f) Authorization of GDR for its representation at the Court of Appeal regarding this case, from the Institutional lawyer (substituting the attorney)”*.

By analysing these cases, it is concluded that the Court of Appeal has been generally careful only to respect the formal requirements provided by the Albanian Code of Civil Procedure, bypassing the requirements of the New York Convention. It is visible, for example, the acceptance by the court of the requests for recognition unaccompanied by *the arbitration agreement*, as this document (the arbitration agreement) is not integrated into the requirement of the Albanian Code. Thus, in the case “*Recognition of the Arbitration Award – AEDP versus the Republic of Albania*”, the applicant fails to present to the Court, as a written document, the arbitration agreement between the parties which is formed as an Arbitration Clause¹⁸³. Consequently, the Court of Appeal has not administrated this as an evidence and, moreover, makes no mention of the Arbitration Clause in its decision, when argues the competence of the International Court of Arbitration (ICC) to render the arbitration award. Failure to present the arbitration agreement as an attachment to the request for recognition, failure to be administrated as a written document at the hearing and the lack of reference from the Court of Appeal of the Arbitration Agreement, happens because the Court of Appeal remains faithful, in procedure and in reasoning its decision, only to the provisions of article 396 of the Albanian Code and bypasses the New York Convention.

Therefore, the Court of Appeal has not evaluated the requirements of the provision of the New York Convention, regarding the documentation that the applicant should submit for the recognition of an arbitral award, in front of the competent authority of the country where the recognition is sought. There are not specifically taken into consideration the requirements of article 4 of the Convention which provides that the request for recognition must be attached to the *arbitration award* and *arbitration agreement*¹⁸⁴ between the parties. Only by the submission of these two documents, the request for recognition has the legitimacy *prima facie* to invest the competent court which grants the recognition. In fact, article 4 of the Convention is endorsed to facilitate the process of recognition and enforcement of an arbitral award, anticipating certain minimum requirements that must be met by the party requesting such recognition¹⁸⁵.

¹⁸³ Section 2/C, paragraph 8, of the Framework Agreement, signed between "AEDP" and the Albanian Government, dated June 23, 1997.

¹⁸⁴ Article 4, section 1, paragraph “b” of the New York Convention.

¹⁸⁵ Albert Jan van den Berg – “New York Convention 1958: Summary”; “Enforcement of the Arbitration Agreement and International Arbitral Award”, ed. Emmanuel Gaillard & Domenico Di Pietro, (pub. London: Cameron May) 2008, pg.12-13.

Despite the authority that the New York Convention has in Albanian internal legal order, the Court of Appeal, in many cases, ignore the existence of this convention, focusing only on the provisions of the Albanian Code of Civil Procedure. There are cases of the judicial practice, when the competent authority for the recognition of foreign arbitral award (the Court of Appeal), does not mention at all the New York Convention in its decision rendered to grant the recognition. For example, in the case “*Recognition of the Arbitral Award: AEDP versus the Republic of Albania*”, according to the filed documentation, there is no mention of support or referral in the provision of the New York Convention 1958 “On the recognition and enforcement of foreign arbitral awards”. The formal request of the plaintiffs (foundation “AEDP”), applying for recognition of the foreign arbitral award, has as the only legal basis, only the provisions of articles 393-397 of the CCP. In the entire contents of the submitted request, there is no reference to any of the provisions of the Convention. Likewise, the award of the Court of Appeal in Tirana no.54 date 29.05.2007, in no case mentions the obligation to implement the provisions of the New York Convention. In addition, the Civil Division of the Court of Appeal, when evaluates the elements of the foreign arbitral award and its fulfillment of the criteria of articles 394 and 396 of the Albanian Code of Civil Procedure, does not refer, at any point, the provisions of the New York Convention.

In none of the cases reviewed by the judicial practice, the Court of Appeal has not taken in consideration and has not given any evaluation regarding the nature of the arbitral award, if it is considered a foreign or internal (local) award. Apparently, the court has presumed that the arbitral award, subject of request for recognition, has the status of the “foreign” (non-internal) arbitral award. It is understandable that such presumption was refutable, but in no case the party against whom the application for recognition was presented, has not filed such a claim to challenge the Court of Appeals jurisdiction. In fact, any claim of this nature would be considered groundless, in reference to article 1 of the New York Convention¹⁸⁶, as the status of the “foreign” award for Albania is determined, primarily, by the country of the arbitration procedure (which, in any of the cases examined, has not been the Republic of Albania).

The active legitimacy of the applicant for the recognition of a foreign arbitral award has not been subject to review by the Court of Appeal. A very

¹⁸⁶ The New York Convention, article 1(1): “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”.

interesting case, on this point, appears in the issue of the award recognition on the case: “BE-HA-SE” *versus* GDR and MPATT, Albania” where the demand for recognition is submitted by the sued party (GDR), against which is directed the demand for arbitration and that is largely considered “loser” of the foreign arbitral award¹⁸⁷. As results, from the analysis of the above case, the Court of Appeal has accepted the request for recognition and has reviewed it, resting on the fact that the request is submitted by an entity that was a party to the arbitration proceedings and claims a legitimate interest in the recognition of this award in the Republic of Albania. For the Court of Appeal does not matter if the applicant is *the plaintiff* or *the defendant* in the arbitral proceedings, as it does not matter if the applicant is “the winner” or “the loser” of foreign arbitral award, as long as the applicant has a legitimate interest on the recognition of the arbitral award.

The decision of the court of appeal in all the cases, when evaluating the barriers for recognition, uses the term “basis principles of the Albanian legislation”, expressing the fact that the court has evaluated whether present foreign arbitration award does not conflict with these principles. In this case, the Court of Appeal, refers to the legal definition used in paragraph (dh) of article 394 of the CCP. Whereas, the New York Convention, for the same purpose, provides as definition “*public order*”¹⁸⁸, a definition which is different in different countries. Generally the application of this definition means refusing enforcement of foreign arbitral awards, which are manifestly contrary to law or fraud, that are violators of human rights or fundamental freedoms, or scandalous in their content. Despite the term used at this point, we can conclude that the Albanian judicial practice runs parallel with the spirit of the New York Convention, in terms of the barrier of recognition and enforcement of foreign arbitral award.

The problem found in the Albanian judicial practice is the leaving from the New York Convention approach on the grounds of refusal the recognition, regarding the *arbitrability of the conflict*, subject of the arbitral award. In all the cases studied in this paper, it is identified the “indifference” of the Court of Appeal to evaluate the arbitrability of the conflict, when evaluating the competence of the foreign arbitral forum to settle the dispute,

¹⁸⁷ See the International Court of Arbitration Award, date April 2, 2008, No.12016/ACS/FM (“BE-HA-SE” *versus* the Republic of Albania), which was announced and forwarded to the complainant on April 8, 2008 by the Secretariat of the International Court of Arbitration.

¹⁸⁸ The New York Convention, article 5/2: “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The subject matter of the dispute is not capable of settlement by arbitration under the law of that country, or the recognition or enforcement of the award would be contrary to the public policy of that country” (“*arbitrability*” and the “*public order*” clause).

in order to verify the barrier criteria (ground of refusal), provided by article 394, paragraph “a” of the CCP¹⁸⁹. The Albanian Code of Civil Procedure, which regulates the recognition of the foreign awards, does not prevent the Court of Appeal to evaluate all the circumstances which affect the competence of the foreign arbitral forum to examine this case and to render an award on it. These circumstances are *the existence of a valid arbitration agreement* and the *arbitrability of the conflict*, but, as it results from the practice, the Court of Appeal considers only the first circumstance when evaluating the competence or the incompetence of the forum.

At this point, it should be noted that the doctrine of international arbitration promotes the possibility of raising the claim on *arbitrability of conflict* in front of the competent court invested to review the request for recognition, as provided by the provision of the New York Convention. According to this doctrine, the question of *arbitrability of conflict* can be raised, as a legal ground, in four different moments: (a) in front of a national court, invested to evaluate the validity of an arbitration agreement; (b) in front of the arbitrators themselves, when they consider and decide on the extent of their competence; (c) in front of a national court, usually the competent court of the country where the arbitration is conducted, trying to set aside the arbitral award; and finally (d) in front of a national court, invested for the recognition of a foreign arbitral award, trying to refuse the recognition¹⁹⁰.

As above, we conclude that, regardless the internal law (Albanian Code of Civil Procedure) allows and the international doctrine stimulates the control of the *arbitrability* from a national court, in front of which the recognition of a foreign arbitral award is requested, the Albanian court practice departs from this approach. That’s precisely because the Court of Appeals do not consider one of the main legal grounds for refusal of the award recognition, provided by the New York Convention, which is the non-arbitrability of the conflict, subject of the award. Therefore, the Albanian court does not take into consideration the recognition criteria (in other words the “recognition barriers”) of a foreign arbitral award provided by the New York Convention, while this is a constitutional obligation, as stated in the

¹⁸⁹ Code of Civil Procedure, article 394, paragraph (a): “... according to the provision in force in the Republic of Albania, the dispute matter stated in the award may not be competence of the court (arbitration forum) of the State that rendered the award”.

¹⁹⁰ Tibor Varady, [John J.Barcelo](#) - “International Commercial Arbitration – A “Transnational Perspective” (American Casebook Series), fourth edition, 2009, p.234.

decision of the Albanian High Court No.6, dated 01.06.2011¹⁹¹. The Supreme Court has stated, in the above decision, that the requirements of the internal law which are presented as obstacles to the recognition of foreign arbitral awards should not preclude the court's evaluation of the criteria of the New York Convention, contrariwise should be considered as complementary grounds to them¹⁹².

Conclusion and recommendations

The Albanian court practice has already consolidated the procedural legal instruments for the recognition of the foreign arbitral awards. Through the awards¹⁹³ given by the Court of Appeal, in its capacity as the competent authority of the country where the recognition and enforcement is sought, a foreign arbitration award is recognised and it is given legal force in the Republic of Albania, as required in each case. In this way, it can be concluded that in the Albanian judicial practice, in general, the New York Convention is implemented and at the same time is materialized in practice the international involvement of Albania to implement this Convention. In practice, the enforcement of the foreign arbitral award, is carried out through two decisions issued by the Court of Appeal: the first one grants the formal recognition and the second issues the warrant of execution.

From the detailed analysis of the procedural elements of the judicial processes of recognition, it is concluded that the Court of Appeal pays no proper attention to the Convention's requirements, but generally evaluates only the meet of the requirements of the Albanian internal law (Code of Civil Procedure). Bypassing of the New York Convention by the national court, it is firstly noted to the evaluation of legal criteria related with the documents

¹⁹¹ See the decision no.6, date 01.06.2011 of the Albanian High Court, paragraph 17: "In the judicial investigation of cases in which is required the enforcement of the awards of the foreign arbitrations, in accordance with article 122 of the Constitution, necessarily must be taken into the account the verification of the existence or not of any substantial legal ground, provided by article 5 of the New York Convention, if the parties belong to States that are parties to this Convention".

¹⁹² *Idem.*, paragraph 20: "In the second phase, if the request to enforce the award of a foreign court or a foreign arbitration meets the conditions for formal-procedural regularity of its filing, the Court of Appeals sets the hearing in which the subject of the trial is only the existence or not of some of the obstacles and legal grounds provided by article 394 of the Code of Civil Procedure, article 5 of the New York Convention or the any special provision for this purpose, provided for by law or other international agreement".

¹⁹³ The decisions rendered by the Court of Appeal in Tirana with no.54, date 29.05.2007; no.34, date 31.03.2009; no.17, date 27.02.2007; no.106, date 08.11.2007; no.122, date 14.12.2010.

that formally must be attached to the recognition request. It is exactly in this procedural point, that the national court bypasses the requirement of the Convention, neglecting (tolerating) in some cases the non-presentation of the arbitration agreement as an important document that, according to article 4 of the Convention, must be attached to the request for recognition.

Similarly, when evaluating the obstacles for the recognition of the foreign arbitral award in Albania, the national court is focussed mainly on the requirements of internal law, while initially should be considered the criteria of the New York Convention. In particular, the court is silent regarding the arbitrability of the conflict, subject of the foreign arbitral award, as one of the main requirements of the Convention (article 2.5) to accord the recognition of this award.

The need arises to sensitize the domestic national courts to support arbitration process, because without this support, the arbitration and particularly the international arbitration will remain ineffective. Regarding to this, an important role is played by the Court of Appeal as the competent authority to authorize recognition, in different words, the authority which makes effective the award of a foreign arbitration in Albania. This Court, until the adoption of the new legal framework, has the task to overcome the legal handicap, created as a result of discrepancies between the provisions of the New York Convention and the ones of the CCP. The panels of this court, in cases of recognition of foreign arbitral awards, must apply in a complementary manner for as long as they do not contravene with each other, the provisions of the Convention and the Code. Such application of the provisions is necessary to evaluate the application procedures for recognition and its accompanying documentation, as well as to verify the grounds for refusal or legal barriers to the recognition of award, which are subject to the Convention. Moreover, it should not forget the fact that the provisions of the Convention have priority and, in case of conflict, they prevail over the provisions of the Code of Civil Procedure. Therefore, any decision of the Court of Appeal, which states the recognition of a foreign arbitral award, must necessarily mention the provisions of the Convention. The lack of such a reference may constitute a sufficient legal ground to recourse against the decision of the Court of Appeal.

The Court of Appeal, in processing the application for recognition of a foreign arbitral award should require the deposit of the arbitration agreement, as documentation that accompanies the application. Also, this court must decide on the assessment of possible defects of this agreement, which can be assessed by the court *ex officio*, or at the request of the party against whom recognition of the award is sought. It is also the duty of the Court of Appeal to state that the award, submitted for recognition, meets or not the criteria of a *foreign* arbitral award, criteria which are stipulated by the

New York Convention and domestic legislation. Such an expression is necessary in order that the Court of Appeal can prove its jurisdiction on the subject matter.

The Albanian courts in proceedings for recognition of foreign arbitral awards should pay more attention to the New York Convention and its interpretation. In this context, they should follow the rules of interpretation contained in the “*travaux préparatoires*”, which presupposes the interpretation of the Convention, based on the explanations of various documents (reports, reviews, etc.), which are produced before and during its drafting. While, for some legal concepts, that constitute legal obstacles to the recognition, i.e., "public order" or "public policy", it is important that the doctrine of law and jurisprudence make an interpretation of the extent of the meaning of these terms (e.g. it would be useful a unifying interpretation of the Supreme Court).

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